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—IN THE—

Supreme Court of the United States.

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OCTOBER TERM, A. D. 1906.

JACOB NEWMAN AND SALMON O. LEVINSON, SURVIVING PARTNERS OF THE FIRM OF NEWMAN, NORTHRUP & LEVINSON,
Plaintiffs in Error,

vs.

HARRY B. GATES,
Defendant in Error.

No. 137.

Error to the Supreme Court of Indiana.

Brief for Plaintiffs in Error.

CHARLES MARTINDALE,
Attorney for Plaintiffs in Error.

S. S. GREGORY,
Of Counsel.

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BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

Newman, Northrup & Levinson were a firm of lawyers in the City of Chicago. Gates is a citizen and resident of Indiana. Gates employed Newman, Northrup & Levinson as his attorneys in a proceeding in the Circuit Court of Lake County, Illinois, being a voluntary assignment for the benefit of creditors of the American Mortar Company, in which Gates was trustee. The preferential mortgages held and manipulated by Gates's father,

apparently with the co-operation of the defendant himself, exhausted the estate and Gates refused to pay the attorneys their fees. On June 19, 1893, in the Circuit Court of Cook County, Illinois, they recovered a judgment for $1,300 in an action in assumpsit against Gates for their fees. In that action he appeared and resisted a recovery upon, among other things, the same grounds which he urged below when the judgment was sued over in Indiana.

The present action was brought to the Superior Court of Marion County, State of Indiana, on that judgment of the Circuit Court of Cook County, Illinois. The complaint (Rec. p. 5.) was in one paragraph, alleging the recovery of the judgment in Illinois, its date and amount, that it was unpaid and praying judgment thereon. The defendant in error filed a counter-claim (Rec. pp. 7–12).

The counter-claim alleges substantially that the defendant in error, expecting to become assignee of the American Mortar Company, a corporation, which had been engaged in business in the City of Chicago, and owned a plant, including real estate and boats, which were located in the City of Waukegan, State of Illinois, retained the plaintiffs in error to look after, direct and control all legal matters of whatever kind and nature it would be necessary and proper for him as such trustee to have looked after, directed and controlled by a competent lawyer or lawyers (Rec. pp. 7–8, f. 12); that the plaintiffs in error undertook the employment, and the defendant in error relied solely upon their advice and counsel (Rec. p. 8, f. 13); that the plaintiffs in error never informed defendant in error that it was the law in the State of Illinois that a trust estate could only be made

liable for the payment for legal services rendered any trustee by a formal order, duly entered, authorizing the employment of a lawyer for the rendition of such services, and that he did not know such to be the law (Rec. p. 8, f. 13); that plaintiffs in error failed to procure any such order (Rec. p. 8, f. 13); that plaintiffs in error sued defendant in error and by reason of the fact that no such order ever was made by the court, recovered judgment against defendant in error personally (Rec. pp. 9–10); that the judgment so obtained is the judgment sued on in this action; that the neglect of the plaintiffs in error to obtain such an order and the neglect to inform defendant in error that such order was necessary for his protection was the sole cause of rendition of said judgment against defendant in error; that after the payment of preferred claims and upon dismissal of said assignment proceedings there were no assets of the American Mortar Company in the hands of the defendant in error, out of which he could re-imburse himself for the amount of said judgment for attorney's fees (Rec. p. 9–16); that an order of sale of the assets of said American Mortar Company was procured; that defendant in error was present at said sale; that plaintiffs in error were present at said sale; that defendant in error cried the sale; that a bid of $5,300 was made and the property was struck off to said bidders; that said bidders were unable to make good their bid; that defendant in error was then advised to re-offer the property, which he proceeded to do; that a responsible bidder, one O'Brien, bid for the property; that plaintiffs in error bid a higher sum; that O'Brien challenged the right of plaintiffs in error to bid for the property, and refused to bid further. The plaintiffs in error bid

$3,000 for the assets, and defendant in error struck off the property to plaintiffs in error and received a check from them in payment of their bid. That when the bid was reported to the Circuit Court, having jurisdiction of the assignment, it appeared that mortgagees had taken possession of the property under their mortgages, and defendant in error could not deliver it, and plaintiffs in error were relieved from their bid; that by reason of the misconduct of plaintiffs in error in bidding for the property defendant in error was prevented from making a sale to O'Brien, which would have enabled defendant in error to pay all his charges as trustee; that by the failure of plaintiffs in error to procure an order of court, relieving defendant in error of personal liability, and by reason of their misconduct of bidding at the sale of the assets, defendant in error was damaged to the sum of $2,500. (Rec. pp. 10–11.)

To this counter-claim plaintiffs in error filed an amended reply (Rec. p. 14), setting forth the proceedings in the Circuit Court of Cook County, Illinois, in the action by plaintiffs in error against defendant in error, wherein the judgment sued on was recovered (Rec. pp. 14–24); also pleading the statutes of Illinois, permitting the amendment of pleadings and the statute of amendments and jeofails; also pleading the law of the State of Illinois that in an action of assumpsit for work and labor *quantum meruit* the defendant may prove, under the general denial, any and all facts which would entitle him to damages against the plaintiff for the negligent and wrongful manner in which he performed such services (Rec. p. 25); and pleading that at the trial of the action in the Circuit Court of Cook County, wherein the judgment against defendant in error was rendered,

the defendant in error, in his defense, offered evidence in support of the causes of action set forth in his counter-claim, and that the causes of action set forth in said counter-claim were litigated and determined in said action in the Circuit Court of Cook County, and that said causes of action set forth in said counter-claim had been adjudicated between the parties in the former judgment sued upon (Rec. pp. 25–26). Plaintiffs in error also filed a reply of general denial (Rec. p. 26).

The cause was submitted for trial and the court, holding that all the matters set up in defendant's counter-claim were adjudicated by the judgment sued on, instructed the jury to find for plaintiffs and a verdict was returned accordingly (Rec. pp. 28–29).

Defendant appealed to the Appellate Court of Indiana, and the cause was reversed (Rec. p. 34, f. 52).

Gates v. *Newman*, 18 Ind. App. 392.

The Appellate Court held that the defendant's counter-claim stated matters which constitute something more than a mere defense to the plaintiffs' action in assumpsit for services, brought in Cook County, and, therefore:

"It follows that it cannot be said that under the general issue the matter was necessarily adjudicated. If it was *in fact* adjudicated, it cannot be litigated again; but whether it was in fact so adjudicated must be determined upon the trial."

Gates v. *Newman*, supra, p. 412.

The cause was again tried upon the issues joined upon the complaint and the counter-claim and the reply thereto (Rec. pp. 34–53), resulting in a verdict in defendant's favor for $184.74. (Rec. p. 53.)

The court rendered judgment in favor of defendant on the verdict, and from that judgment plaintiffs appealed to the Appellate Court of Indiana (Rec. p. 57, f. 88).

The Appellate Court reversed the judgment below (Rec. p. 324, f. 562), saying *inter alia* (Rec. p. 323, bottom line to p. 324, end of f. 562):

"It is shown by the evidence without conflict that all matters in relation to the alleged misconduct of the plaintiffs in bidding at the sales of the assets of the trust estate were presented upon the trial in which the original judgment was rendered. Having been once judicially considered, they cannot be a second (time) litigated.

The employment by the defendant of the plaintiffs was a single employment. They brought their action to recover for services rendered therein. In that action it was incumbent upon them to set up their entire claim. They could not have one judgment and thereafter, in any form, obtain a further judgment on account of some overlooked item.

The defendant had the option of presenting his claim, on account of the alleged misconduct, in the action brought against him or to set it up subsequently. When he chose to litigate the subject it devolved upon him to present each item involved therein.

Neither party had the right to split up his cause of action; if they had, there might be as many law suits as there were items in their respective claims. *Hoover* v. *Kilander*, 135 Ind. 600.

The principle announced in *Fischli* v. *Fischli*, 1 Blkf. 360, often approved and never doubted, is directly applicable.

The subject of the counter-claim having been involved in the prior action, the judgment then rendered is conclusive, and the jury should have been so instructed. The wisdom of the rule is illustrated by the facts of this case. It is established without conflict that the counter-claim, in so far as it counts upon a failure to procure an order relative to attorneys' fees prior to the final settlement of the trust is entirely without foundation.

The cause was submitted to the jury upon the question of appellant's negligence in failing at the final settlement to procure an order charging the estate with attorneys' fees, before the assets thereof were permitted to go out of court, a breach of duty not described or set up in the counter-claim.

An essential condition of the alleged wrong was that the relation of attorney and client existed between the parties at the time of the discharge. The evidence upon this subject, a disputed one at this time, was heard in the original trial."

Appellee's petition for a rehearing was overruled. (Rec. p. 327, f. 567.)

On appellee's petition the Supreme Court of Indiana removed the cause from the Appellate Court to that court for decision. (Rec. p. 328, f. 568.)

Upon consideration the Supreme Court dismissed the appeal upon the ground that the personal representative of Northrup, who had died before the appeal was taken from the judgment of the Superior Court, had not been made a party, and on account of the failure to make the personal representative of Northrup a co-appellant the court had no jurisdiction to determine the case upon its merits. (Rec. pp. 328–331.)

After the reversal by the Appellate Court, the removal into the Supreme Court of the State of Indiana, and the opinion of the latter court dismissing the appeal for defect of parties, appellants (the plaintiffs in error) filed a petition for rehearing (Stipulation and Addition to Record, p. 4).

In appellants' petition for a rehearing its fourth cause, relied upon as grounds for a rehearing, was as follows:

"4. That the said Supreme Court erred in denying full faith and credit to the record and judicial proceedings of the Circuit Court of Cook County, State of Illinois, in violation of Article 4, Section 1, of the Constitution of the United States, in this, to-wit:

(a.) That whatever issues of fact and law were or might have been litigated between the parties under the issues as formed in the suit in Cook County, Illinois, are *res adjudicata* and merged in the judgment in that case.

(b.) That as a question of law this court is bound to adjudge that under the issues as shown in the record to have been framed in the Circuit Court of Cook County, Illinois, between the parties to this suit in the action wherein the judgment sued upon was recovered, any cause of action which the appellee, Harry B. Gates, may have had against the partnership of Newman, Northrup & Levinson, or the individual partners thereof, for breach of contract of employment as attorneys, was adjudicated by the said judgment in the Circuit Court of Cook County, and, therefore, said Gates had no cause of action against either or any of the members of the partnership of Newman, Northrup & Levinson which would survive, and consequently there could be no defect of parties appellant by the failure to join the personal representative of George W. Northrup, Jr., deceased.

(c.) That by holding as it has held in its opinion, that the cause of action which is the subject of appellee's counter-claim was not adjudicated by the judgment sued upon, this court has failed to give to said judgment that force and effect which it has between the parties in the state wherein it was rendered, to-wit: the State of Illinois, and thereby has denied full faith and credit to said judgment, contrary to and in violation of Article 4, Section 1, of the Constitution of the United States; and that if this court gives full faith and credit to said judgment and holds that said cause of action of appellee is adjudicated by said judgment, then it must follow that said appellee has no cause of action which would require that Northrup's personal representatives be made parties to this appeal, and the judgment dismissing this appeal is erroneous."

On June 21, 1905, this petition was overruled (Rec., p. 331), whereupon the writ of error from this court was sued out.

The petition for writ of error to this court and the Assignment of Errors accompanying the same were filed in the Supreme Court of Indiana October 3, 1905 (Rec., pp. 332–335).

On the same date the order allowing the writ of error was made by the Chief Justice of the Supreme Court of Indiana (Rec., p. 335), and the bond was fixed at $500.

On the same day the bond was approved and filed (Rec., p. 336), and the writ issued and lodged with the Clerk of the Supreme Court of Indiana, and a copy thereof for the defendant in error. (Rec., 337.)

ERRORS ASSIGNED.

The errors assigned are as follows (Rec., p. 332):

The Supreme Court of Indiana erred in holding and deciding:

"1. That the counter-claim set up by appellee Gates, the defendant in the trial court, based upon a breach of the same contract of hiring, which was the basis of the action of the appellants against the appellee Gates, in the Circuit Court of Cook County, Illinois, was not adjudicated by the judgment in the Circuit Court of Cook County, Illinois, and by so deciding denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between the parties in the State of Illinois, wherein it was rendered, and denies full faith and credit to said judgment contrary to and in violation of Article 4, Section 1, of the Constitution of the United States.

2. That the appellee's counter-claim being valid and not merged and adjudicated by the judgment of the Circuit Court of Cook County, Illinois, it was of a nature which survived against the personal representatives of a member of the partnership of Newman, Northrup & Levinson, and that the personal representatives of the deceased partner were necessary parties to the appeal, and not having been made parties that neither the Appellate Court of the State of Indiana, nor the Supreme Court of the State of Indiana, had jurisdiction to determine the appeal, and the same must be dismissed, and judgment of dismissal was so rendered. Which final judgment of the Supreme Court

necessarily involved the adjudication of the claim of the appellants to the protection of Article 4, Section 1, of the Constitution of the United States, that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state,' which adjudication was adverse to appellants' claim under said provision of the Constitution of the United States."

Points of Argument.

THE FEDERAL JURISDICTION.

I.

Undoubtedly the general rule is that where a judgment of the state court rests upon an independent separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court expressly to pass on the federal right or immunity specially set up, of record, is not conclusive, but this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law.

If the federal right or immunity set up would require that judgment should have been rendered for the plaintiffs in error that result could not be avoided merely by silence on the federal question and by placing the judgment on some principle of the local law. The constitutional grounds relied on must, if sus-

tained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties.

Chicago, B. & Q. R. Co. v. *Illinois*, 200 U. S. 561.

West Chicago St. R. Co. v. *Illinois*, 201 U. S. 506.

Terre Haute etc. R. R. Co. v. *Indiana*, 194 U. S. 579.

Yazoo & M. R. Co. v. *Adams*, 180 U. S. 1.

Chapman v. *Goodnow*, 123 U. S. 540.

Insurance Co. v. *Needles*, 113 U. S. 574.

The claim of a federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it.

II.

Where the federal question was properly set up and relied upon and was necessarily involved in the decision of the cause, although the state court was silent on the federal question and placed its judgment upon a point of local law, the necessary effect of which was to deny the federal right and immunity specially set up and claimed, this court will not sustain a motion to dismiss or affirm, unless such federal question is (1) wholly formal, or (2) so absolutely devoid of merit as to be frivolous, or (3) has been so explicitly foreclosed by a decision of this court as to leave no room for real controversy.

Equitable Life v. *Brown*, 187 U. S. 308.

III.

The jurisdiction of this court is not defeated because it may appear upon examination of the federal question that the decision upon the merits should be adverse to the plaintiffs in error.

Insurance Co. v. *Needles*, supra.

C. B. & Q. R. Co. v. *Illinois*, supra.

West Chicago St. R. Co. v. *Illinois*, supra.

IV.

No particular form of words or phrases has ever been declared necessary in which the claim of federal right must be asserted. It is sufficient if it appears from the record that such rights were specially set up and claimed in the state court in such manner as to bring them to the attention of that court. If, from the whole record, this court is able to see clearly that the title, right, privilege and immunity under Article 4, Section 1, of the Constitution of the United States, requiring that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, was set up and claimed in the state court and relied upon by the plaintiffs in error, and that the necessary effect of the decision of the state court was to deny that right, the federal question is sufficiently presented.

Green Bay, etc., v. *Patten Paper Co.*, 172 U. S. 58.

National, etc., Loan Assn. v. *Braham*, 193 U. S. 635.

Jacobs v. *Marks*, 182 U. S. 583.

Huntington v. *Attrill*, 146 U. S. 657.

Farmers, etc., Co. v. *Dobney*, 189 U. S. 301.

The right to the protection of Article 4, Section 1, of the Constitution of the United States was set up and claimed in the trial court repeatedly, as follows:

On the second trial, wherein the judgment appealed from was rendered, the defendant withdrew his general denial (Rec. p. 34), which left the issues standing for trial only upon the complaint and defendant's counter-claim and reply thereto. As the counter-claim admitted the allegations of the complaint the defendant had the burden and the trial was upon the allegations of the counter-claim.

1. The defendant offered in evidence a transcript of all the evidence given at the trial of the suit brought in the Circuit Court of Cook County by the plaintiffs against the defendant, wherein the judgment sued upon was rendered. (Rec. pp. 74–75.) To this evidence the plaintiffs objected.

"For the reason that it already appears from the testimony (the evidence that has been introduced by the defendant), that there was a trial and adjudication of this matter in the Circuit Court of Cook County, Illinois, and that it is not competent under the provisions of Article 4, Section 1, of the Constitution of the United States to impeach or contradict or to attempt to impeach or contradict the force, effect and scope of that judgment by parole proof, which this is. That Article, as your Honor is aware, provides that full faith and credit shall be given in each state to the judicial proceedings of every other state, and the plaintiffs object for the reason that to attempt to show by parole proof that the matter in question was not adjudicated in the Circuit Court of Cook County, is to deny full faith and credit, as required by the constitutional provision in the Constitution of the United States to a judicial proceeding in the Circuit Court of Cook County, Illinois."

The objection was overruled and the evidence admitted over the objection.

2. At page 155 of the Record plaintiffs objected to the testimony of Warren Hussey on the ground that it was sought by the testimony to vary and contradict the force and effect of the judgment of the Circuit Court of Cook County, Illinois, and to deny full faith and credit to that judgment as required by the Constitution of the United States.

3. Again at page 232 and 233 of the Record, f. 395, plaintiffs objected to the admission of the testimony of Gates, the defendant, as being a denial of full faith and credit and seeking to avoid the force and effect of the judgment in Illinois, which objection was overruled.

4. Plaintiffs at the close of the evidence moved the court to direct a verdict for plaintiffs, which was refused. (Rec. pp. 36–37).

5. The plaintiffs requested the court to instruct the jury, as follows:

"9. The Constitution of the United States provides that full faith and credit shall be given by each state to the judicial proceedings of every other state. Act 4, Section 1.

In this case the Plaintiffs plead as against the Counter-claim of the defendant, the bar of the judgment obtained in the Circuit Court of Cook County, Illinois, and in determining the evidence in this case, you must give full faith and credit to the Record of such adjudication. If you find it the Law of Illinois that when Plaintiffs sue in *indebitatus* assumpsit upon a *quantum meruit* suit, the burden is upon them of showing that they have rendered services of the value alleged in the complaint, and that upon such allegation a judgment had been recovered by the Plaintiffs, you must take it as conclusive that the services sued for were rendered as the law required them to be rendered and that they

were of the value as found by the judgment in evidence, and therefore, the Defendant is by such record concluded and estopped from saying either that the services were not so rendered or that the services sued for were not properly rendered or that they were not of the value as found and adjudged by the Court, and this you are required to do under the provisions of the Constitution of the United States."

"Refused and excepted to by Plaintiffs this 9th day of December, 1899.

JOHN L. MCMASTER, Judge."

(Rec. p. 43).

6. After the verdict was rendered plaintiffs moved the court to render judgment in their favor notwithstanding the verdict. (Rec. p. 54.)

7. Plaintiffs filed a motion for a new trial (Rec. pp. 55, 56 and 57), in which they alleged the errors above mentioned and others as grounds for a new trial. This motion was overruled by the trial court and judgment rendered against the plaintiffs upon the verdict (Rec. p. 57), whereupon the plaintiffs appealed.

In the Appellate Court these errors were fully argued and the protection of the Constitution of the United States insisted upon, and the Appellate Court reversed the judgment of the court below, using language already quoted, but material here, and therefore repeated for convenience:

"It is shown by the evidence without conflict that all matters in relation to the alleged misconduct of the plaintiffs in bidding at the sales of the assets of the trust estate were presented upon the trial in which the original judgment was rendered. Having been once judicially considered, they cannot be a second (time) litigated. The employment by the defendant of the plaintiffs was a single employment. They brought their action to recover for services rendered therein. In that action it was incumbent upon them to set up their entire claim. They

could not have one judgment and thereafter, in any form, obtain a further judgment on account of some overlooked item.

The defendant had the option of presenting his claim, on account of the alleged misconduct, in the action brought against him or to set it up subsequently. When he chose to litigate the subject, it devolved upon him to present each item involved therein.

Neither party had the right to split up his cause of action; if they had, there might be as many law suits as there were items in their respective claims. *Hoover* v. *Kilander*, 135 Ind. 600.

The principle announced in *Fischli* v. *Fischli*, 1 Blkf. 360, often approved and never doubted, is directly applicable.

The subject of the counter-claim having been involved in the prior action the judgment then rendered is conclusive and the jury should have been so instructed. The wisdom of the rule is illustrated by the facts of this case. It is established without conflict that the counter-claim in so far as it counts upon a failure to procure an order relative to attorney fees prior to the final settlement of the trust is entirely without foundation."

(Rec. pp. 323–324.)

Again upon appellants' petition for a rehearing in the Supreme Court the federal right was set up and claimed. (Stipulation and Addition to Record, pp. 4–5.)

V.

The Supreme Court of Indiana held that the defendant in error, Gates, had a valid counter-claim against the plaintiffs in error, notwithstanding the judgment of the Circuit Court of Cook County sued upon by the plaintiffs in error. It held that, so far as the judgment of the Circuit Court of Cook County, Illinois, was concerned, the title to that cause of action, upon the death of Northrup, one of the partners in the firm of Newman, Northrup & Levinson, passed to the surviving partners, New-

man & Levinson, and they were the only necessary parties plaintiff and parties appellant. (Rec. p. 330, line 1–7.) But it held that the counter-claim of the defendant in error stated a valid cause of action against all the members of the copartnership of Newman, Northrup & Levinson, and that on an appeal from a judgment on that counter-claim the personal representative of Northrup, deceased, was a necessary party, and that failure to join such personal representative must result in a dismissal of the appeal. (Rec. p. 330–331.)

It is plain that, if Gates's counter-claim is not valid, but is sham and frivolous, as is most obvious, Northrup's personal representative is not a necessary party to the appeal. It is also obvious, we think, that if full faith and credit be given the judgment of the Circuit Court of Cook County, Illinois, between the parties, Gates had no counter-claim. Hence the decision of the court below necessarily involved the denial of the federal right. Whether due faith and credit were denied by the state court to the judgment of the Circuit Court of Cook County, Illinois, is a federal question which this court has jurisdiction on writ of error to examine.

Crescent City Life Stock etc. Co. v. *Butchers Union etc. Co.*, 120 U. S. 141.

Harris v. *Hardeman*, 14 How. 334.

Jacobs v. *Marks*, 182 U. S. 583.

Huntington v. *Attrill*, 146 U. S. 657.

Jaster v. *Curry*, 198 U. S. 144.

Terre Haute etc. R. R. Co. v. *Indiana*, 194 U. S. 579.

Natl. Foundry & Pipe Works v. *Oconto Water Supply Co.*, 183 U. S. 216.

VI.

This court is not bound by the decision of the state court as to its (the state court's) own jurisdiction, if the ultimate determination of that inquiry involve a federal right or immunity set up and relied on in the state court, merely because the state court has the power to decide as to its own jurisdiction.

Thus in *D'Arcy* v. *Ketchum*, 52 U. S., 11 How. 165, the assumption of jurisdiction over the person of a non-resident of New York by a court of that state under a state statute in relation to joint debtors and the rendition of a judgment was held not to conclude this court, and the judgment was held to be invalid because the state court had no jurisdiction.

Knowles v. *Logansport Gaslight & Coke Co.*, 19 Wall. 58.
Hall v. *Lanning*, 91 U.S. 160.
Pennoyer v. *Neff*, 95 U. S. 714.
Wilson v. *Seligman*, 144 U. S. 41.

So also where there is a conflict of jurisdiction between federal and state courts, as in *Marshall* v. *Holmes*, 141 U.S. 589; and *Bank* v. *Stevens*, 169 U. S. 432.

Also in cases where a removal had been taken from the state court to the federal court, but the state court holds that the right of removal was not made out and that it retains jurisdiction and proceeds to trial and judgment which is affirmed by the Supreme Court of the state, this court reviews the decision of the state court as to its own jurisdiction and may reverse it upon that question.

Stone v. *South Carolina*, 117 U. S. 430.
Carson v. *Dunham*, 121 U. S. 421.

Burlington, etc., R. R. v. *Dunn*, 122 U. S. 513.

Madisonville, etc., Co. v. *St. Bernard Mining Co.*, 196 U. S. 239.

So also in *Andrews* v. *Andrews*, 188 U. S. 14, this court has re-affirmed the rule that where the federal question of "full faith and credit" to the judgment of a sister state has been properly brought into the record in the court below, no matter how it may have been decided by the state court, this court will examine into the record to decide the federal question; that the jurisdiction upon which the judgment depends may be inquired into collaterally and that this court will inquire into the essential nature and real foundation of a cause of action to ascertain whether the claim is really one of such a nature that the court is required to enforce it.

It is precisely that which plaintiffs in error are here asking this court to do. They ask that this court shall examine Gates's counter-claim and, looking into the whole record, say that after the conclusion of the trial between the parties in the Circuit Court of Cook County, Illinois, Gates had no vestige of a cause of action left unmerged in the judgment of that court and nothing upon which to base a counter-claim when sued upon the Illinois judgment in the courts of Indiana; that the "full faith and credit" clause requires this conclusion, and that this conclusion destroys the foundation upon which the decision of the jurisdictional question by the Supreme Court of Indiana rests.

Atherton v. *Atherton*, 181 U. S. 155.

Thompson v. *Whitman*, 18 Wall. 457.

Wisconsin v. *Pelican Ins. Co.*, 127 U. S. 265.

So in *Finney* v. *Guy*, 189 U. S. 335, the court said:

"Without precisely determining just how far questions of this kind can in all cases be regarded as coming under the rule giving full faith and credit to the public acts, records and judicial proceedings of another state, *depending as such questions must, upon the particular facts of each case, and the manner in which they are presented*, we may, nevertheless, examine the contentions of the plaintiffs in error to see how far they are justified in the law."

Upon looking into the record in that case and determining for itself what was the force and effect in the state wherein it was rendered of the judgment in that case relied upon, this court held that there was no cause of action and affirmed the judgment of the state court dismissing the suit.

VII.

The court below, for the purpose of determining its jurisdiction and to that end to ascertain who were the necessary parties to the appeal, had the power to look behind the mere paper case made by the pleading of a counter-claim by defendant in error. Pleadings must be *bona fide* and if, from the record before it, the fact appeared that the counter-claim was a sham defense entitled to no consideration, it could not affect the jurisdiction of that court founded upon the cause of action set up in the complaint to which the surviving partners of Newman, Northrup & Levinson alone were necessary parties appellant. The allegations of the counter-claim did not preclude the court from examining as to whether it pleaded a valid cross-demand to which the personal representative of Northrup was a necessary party.

McElmoyle v. *Cohen*, 13 Pet. 312, 325.

Thompson v. *Whitman*, 18 Wall. 457.

Atherton v. *Atherton*, 181 U. S. 155.

Bell v. *Bell*, 181 U. S. 175.

Streitwolf v. *Streitwolf*, 181 U. S. 179.

Andrews v. *Andrews*, 188 U. S. 14.

Finney v. *Guy*, 189 U. S. 335.

In *Jaster* v. *Curry*, 198 U. S. 144, suit was brought in Nebraska upon a judgment rendered in Ohio. The defendant set up by way of answer that the judgment plaintiff had obtained jurisdiction in Ohio by fraud, the fraud being that the judgment plaintiff had served notice on the judgment defendant to take a deposition in Ohio. While attending there to take the deposition he was served with the process in the case wherein the judgment was rendered. The Nebraska trial court held this to be a good defense and rendered judgment for the defendant. This jugdment was affirmed by the Supreme Court of Nebraska without referring to the federal question, basing its decision upon the law of procedure in Nebraska. This court assuming that a plea that the judgment sued on was obtained by fraud would be a good equitable plea, examined the allegations of the answer and from such examination determined that the facts alleged in the answer did not constitute a fraud; that there was no ground of defense to the jurisdiction of the court rendering the judgment sued on, reversed the decision of the Nebraska court and remanded it with instructions to proceed with the cause.

VIII.

The question of the force and effect of a judgment in the state wherein it was rendered as an adjudication between the parties when raised in a foreign jurisdiction, is not a question of

fact upon which the verdict of a jury is conclusive. This is the position assumed by counsel for defendant in error. (P. 19-20-21. Brief of Defendant in Error on motion to dismiss or affirm.)

The very case which the counsel cite to support that contention destroys it.

In *Finney* v. *Guy*, 189 U. S. 335, this court held that the law of a foreign state as declared by statute and decision is not a fact which being alleged in the complaint is admitted by demurrer. But that the statutes and decisions of the foreign jurisdiction having been presented to the court, the court will for itself adjudge what is the force and effect of a judgment in the state wherein it was rendered.

In that case the judgment of the Wisconsin court was affirmed because the court, from an examination of the statute and decisions of Minnesota, could and did determine that the judgment of the Minnesota court did not have in Minnesota, or elsewhere, the force and effect claimed for it and that the Wisconsin court had properly so held.

Eastern Bldg. & Loan Assn. v. *Williamson*, 189 U. S. 122.
Laing v. *Rigney*, 160 U. S. 531.

IX.

It will be contended by defendant in error that the precise federal question here presented did not and could not have arisen until the Supreme Court had the cause, and that it was presented for the first time on petition for rehearing, and the question is therefore presented too late. We quote from pages 25-26, Brief of Defendant in Error on motion to dismiss or affirm:

"The question of full faith and credit to the judicial records of another state by reference to the article of the Constitution was raised by the objection to the introduction of the record of the proceedings of the Cook County Circuit Court upon that ground, in the trial court, and discussed in the Appellate Court as well as the Supreme Court of the State of Indiana. But the precise question now raised, namely, that the dismissal of the appeal necessarily recognized and determined that the matters presented in the counter-claim of the defendant in error were valid, and were not adjudicated by the judgment of the Illinois Court, 'and, by so deciding, denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between parties in the State of Illinois, where it was rendered, and denies full faith and credit to said judgment, contrary to and in violation of Article 4, Section 1, of the Constitution of the United States, etc., etc.,' was not raised or even suggested at any time in the entire proceedings until plaintiffs in error filed their petition for rehearing, and this notwithstanding the fact that defendant in error insisted upon such dismissal in the Appellate Court, as well as when the case reached the Supreme Court of the State of Indiana, and based his motion to remove the case to the Supreme Court of Indiana from the Appellate Court upon the ground that the Appellate Court decided erroneously that the appeal should not be dismissed."

The defendant in error admits that the federal question was presented both in the Appellate and Supreme Courts, as the same had been raised in the trial court.

He admits the motion in the Appellate Court to dismiss the appeal for defect of parties was overruled by the Appellate Court and the opinion of that court (Rec. pp. 322–323–324).

The substance of that opinion supports our contention that giving full faith and credit to the Illinois judgment, Gates has no counter-claim which required the presence on the appeal record of Northrup's personal representative. As defendant in

error admits, the constitutional right was before the Appellate Court and was the ground of its decision. On removal of petition into the Supreme Court the opinion of the Appellate Court and the arguments on which it was based were before the Supreme Court.

Until the decision of the Supreme Court we could not know upon what ground its decision would be based. We think the constitutional right in respect of the Illinois judgment was fairly before it on the record.

Undoubtedly the Supreme Court of Indiana thought that its decision was based upon a question of local practice not involving a federal question. The petition for rehearing called its attention to the fact that in our opinion it could not thus escape the federal question. Whether it could and did is for this court now to decide.

THE FEDERAL QUESTION.

X.

If the judgment in the Circuit Court of Cook County in the action by Newman, Northrup & Levinson against Gates, is conclusive between the parties thereto in the State of Illinois, where it was rendered, not only as to the cause of action (being the reasonable value of their services as attorneys in the matter of the assignment of the American Mortar Company), but also as to all defenses and counter-claims which Gates, under the issue pleaded, might have interposed to defeat said cause of action, said judgment is equally conclusive in every other state and court in the United States.

Christmas v. *Russell*, 72 U. S. 290.

Mutual Life Ins. Co. v. *Harris*, 97 U. S. 331.
Chew v. *Brumagen*, 80 U. S. 497.
Cheever v. *Wilson*, 76 U. S. 108.
Maxwell v. *Stewart*, 22 Wall. 77; 22 L. ed. 564.

XI.

In Illinois the doctrine of *res judicata* embraces not only what has been actually determined in the former suit, but also extends to any other matter properly involved, and which might have been raised and determined in it.

Howell v. *Goodrich*, 69 Ill. 556.
Rogers v. *Higgins*, 57 Ill. 244.
Hanna v. *Read*, 102 Ill. 596.
Bennett v. *Mining Company*, 119 Ill. 9.
Reugger v. *I. & St. L. R. R. Co.*, 103 Ill. 449.
Briscoe v. *Lloyd*, 64 Ill. 33.
Matlock v. *Krome*, 78 Ill. 110.
Garrick v. *Chamberlain*, 97 Ill. 620.
Markley v. *People*, 171 Ill. 260.
Tilley v. *Bridges*, 105 Ill. 336.
Attorney General v. *Railroad Co.*, 112 Ill. 520.
Riverside Co. v. *Townshend*, 120 Ill. 9.
Wright v. *Griffey*, 147 Ill. 496.

Rogers v. *Higgins*, 57 Ill. 244. Rogers brought a suit to enjoin the prosecution of an action in ejectment by Higgins. Higgins set up as a former adjudication, that Rogers had filed a bill in equity to enjoin the prosecution of this same action in ejectment on the ground of an equity in him arising out of an exe-

cution of a contract and deed with Higgins's grantor, and that the decision in that case was adverse to Rogers.

"In avoidance of this it is answered that there was no allegation in the former bill that the lot was the separate estate of Mrs. Wight, so that under the pleadings this question of Rogers's right to the land, because it was the separate estate of Mrs. Wight, could not have been adjudicated in the former suit. Still, the cause of action in the former bill, and in the present, in this respect, is the same, to-wit: that the complainant was entitled to an equity in this property arising out of the execution of the said contract and deed from Mrs. Wight to Rogers, and the present bill, so far as said contract and deed are concerned, is only insisting upon an additional ground in support of the same cause of action. A party cannot have a cause of action adjudicated upon piecemeal in this way.

When the complainant before presented his cause of action before the court he should have brought forward and urged all the reasons which then existed for the support of it. The controversy cannot be re-opened to hear an additional reason which before existed and was within the knowledge of the party in support of the same cause of action.

No one should be twice vexed for the same cause of action. This principle of *res adjudicata* embraces not only what actually was determined in the former case, but also extends to any other matter properly involved and which might have been raised and determined in it. *Stockton* v. *Ford*, 1 Blackf. 360; *Stockton* v. *Ford*, 18 How. (U. S.) 418."

NOTE: The case in 1 Blackford (Indiana) is by misprint given the wrong title. The case in that volume is the leading Indiana case of *Fischli* v. *Fischli*, which decided the same principle, and has become a legal classic.

Briscoe v. *Lloyd*, 64 Ill. 33.

Hanna v. *Read*, 102 Ill. 596, was an action upon a decree in the Circuit Court of Vigo County, Indiana, brought in the Circuit Court of Cook County, Illinois. In sustaining the judgment of

the Indiana court as a complete adjudication the Supreme Court of Illinois said:

"The contention of defendants in error that before an adjudication in a former suit can be made available as an estoppel it must appear that the thing sought to be recovered and the cause of action in both suits are the same, is not universally true. A careful examination of the subject will show there is a diversity in the cases in this respect, which, if kept in view, will satisfactorily explain what would otherwise appear to be irreconcilable statements of different courts of the highest respectability in discussing the law of estoppel by judgment or verdict. Where the former adjudication is relied on as an answer and bar to the whole cause of action, or, in other words, where it is claimed to be an answer to all the questions involved in the subsequent action, then it must appear as claimed by defendants in error that the cause of action and thing sought to be recovered are the same in both suits. The former adjudication in cases of this class is technically known as an estoppel by judgment and the judgment itself is commonly characterized as a bar to the action; but where some specific fact or question has been adjudicated and determined in a former suit and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit if properly presented and relied on, will be held conclusive upon the parties in the latter suit without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an estoppel by verdict and is equally available to a plaintiff in support of his action when the circumstances warrant it as when offered by a defendant as matter of defense. The estoppel relied on in the present case clearly belongs to the class last considered; so it is unimportant whether the cause of action is the same in both cases or not. Although there is the diversity in the two classes of cases we have mentioned it is apprehended there is no material difference in the principle by which they are governed."

The court cites *Cromwell* v. *County of Sac*, in this court (94 U. S. 351), and other cases.

XII.

In Illinois, in a suit in assumpsit under the plea of the general issue, the defendant may prove and recoup any damages sustained by him on account of breach of warranty or malpractice by the plaintiff.

Babcock v. *Trice*, 18 Ill. 420.
Murray v. *Carlin*, 67 Id. 286.
Howell v. *Goodrich*, 69 Id. 556.
Cook v. *Preble*, 80 Id. 381.
Addams v. *Suver*, 89 Id. 482.

XIII.

In Illinois, where an action in assumpsit for the value of professional services is brought, to which the defendant pleads the general issue and goes to trial, any cause of action for malpractice in the rendition of the service which the defendant might have had is forever barred by a judgment in favor of the plaintiff.

In *Howell* v. *Goodrich*, 69 Ill. 556, Goodrich brought an action against Howell and Angell, physicians, to recover damages for malpractice by the defendants as physicians in setting the broken arm of the plaintiff's infant son. The defendants prior to the bringing of this action, had sued Goodrich before a justice of the peace for their professional services in the case, the amount claimed being $25 which amount they recovered in full. Goodrich had judgment below and Howell appealed. The Supreme Court held that the judgment had before the justice of the peace was a complete defense to the action of Goodrich, saying:

"It is said that a portion of the damages are for expenses of treatment of the boy's arm and loss of service accrued after the judgment before the justice, and that the evidence in respect thereto should appear, it being supposed that a fresh action would lie therefor, even if one would not lie for the damages which had accrued before the judgment. But such a distinction cannot be maintained. For such a cause of action, as the one sued on, there cannot be successive suits brought from time to time as damages may in the future be suffered, but the recovery is once for all and may embrace prospective as well as accrued damages. The failure before the justice to get any allowance made by way of recoupment for that portion of the damages which had up to that time accrued on the ground that no malpractice had been committed would preclude any future action for subsequently accruing damages, for the reason that it had once been decided that there was no cause of action for damages and the question could not be re-opened."

XIV.

It is admitted by the court below, in its opinion, that the cause of action of the partnership of Newman, Northrup & Levinson vested in the surviving partners of that firm, on the death of one of them, and in an action thereon personal representatives of Northrup are not necessary parties. (Rec. p. 330, lines 1–7).

The foundation of the court's judgment, dismissing the appeal, is the counter-claim of Gates, which, it holds, states a cause of action which would survive against the deceased partner whose personal representatives are therefore necessary parties on appeal. (Rec. p. 330, line 8 *et seq*).

This assumes that Gates's counter-claim states a cause of action at all; to aver which the court must deny the original judg-

ment sued on by plaintiffs in error the force and effect which it has in Illinois.

XV.

Plaintiffs in error claim that the decision of the Supreme Court of Indiana, dismissing the appeal, was based upon the following premises:

a. Appellee Gates had a valid counter-claim against appellants.

b. The nature of that counter-claim was such that it would survive the death of one of the appellants (defendants to said counter-claim).

c. The personal representative of the deceased member of the partnership was therefore a necessary party to the appeal, and not being made a party the appeal is dismissed for want of jurisdiction.

This decision necessarily involves as one of its postulates that Gates's counter-claim was not adjudicated and extinguished by the judgment of the Circuit Court of Cook County, Illinois, the basis of this action, and so to hold was a denial of that full faith and credit to the judgment of a sister state, to which it is entitled under Article 4, Section 1, of the Constitution of the United States, and denied to the appellants the title, right, privilege and immunity claimed under said constitutional provision.

XVI.

The faith and credit to which the judgment of the Circuit Court of Cook County, Illinois, was entitled in the state wherein it was rendered was made to appear in the reply to the third

paragraph of answer (counter-claim) (Rec. p. 14–26, 2 pp. 25–26), and by the testimony of Frank H. Scott (Rec. p. 270), John C. Mathis (Rec. p. 276), Horace K. Tenney (Rec. p. 283–293), Charles S. Cutting (Rec. p. 297), Edgar B. Tolman (Rec. p. 301).

XVII.

The force and effect to which the judgment of the Circuit Court of Cook County, Illinois, was entitled in the State of Illinois as an adjudication between the parties and as an estoppel by former judgment in a subsequent suit upon the same cause of action between the same parties was controverted by the defendant in error; but the Illinois lawyers produced as witnesses by the defendant all substantially agree with the plaintiffs' witnesses upon the hypothetical questions embracing the facts in the case. The witnesses called by the defendant in error, on this question as to the law of Illinois, were:

Walter S. Horton, Peoria; Thomas F. Tipton, Bloomington; John S. Stevens, Peoria.

Horton concedes that in a suit for services upon *quantum meruit* and *quantum valebat* and defendant's plea of general issue, defendant might show neglect and damages by way of recoupment (Rec. p. 78, Q. 94, and answer), and if he went into such matters in defense, they would in a subsequent case between the parties be *res judicata* (Rec. p. 184, Q. 116 and answer).

Tipton was to the same effect (Rec. p. 198–199, X. Q. 1 to 2 and answers).

Stevens was also to the same effect (Rec. pp. 213–214, X. Q 20 to 30 inc., and answers).

The evidence, therefore, was without conflict as to the force and effect of the Illinois judgment between the parties in the state in which it was rendered. But whether the opinions of the Illinois lawyers were conflicting or not, they are not binding as testimony as to fact supported by a verdict, but are advisory to the court only. The court, as a question of law, was to determine the law of Illinois and the force and effect of the Illinois judgment. Its decision of that question involving, as it does, a constitutional right, this court will review it.

Andrews v. *Andrews*, supra.

Jaster v. *Curry*, supra.

Finney v. *Guy*, supra.

There was no conflict, and could be none as to just what transpired upon the trial between the parties in Illinois, for the transcript of the record and proceedings in the Cook County Circuit Court was introduced in evidence by the defendant in error himself (Rec. pp. 63 to 140 inc.), and it was shown that under the general issue Gates there undertook to prove neglect and misconduct of the plaintiffs to defeat or reduce their recovery. On this evidence the trial court should have directed judgment for plaintiffs, or should have rendered judgment in their favor, notwithstanding the verdict. To refuse to do so was to deny full faith and credit to the Illinois judgment.

XVIII.

At all subsequent stages of the proceedings full faith and credit required that it be held that Gates's counter-claim was *res judicata* and invalid as a defense or as a cross-demand. The appeal by plaintiffs in error, as surviving partners of the copart-

nership of Newman, Northrup & Levinson, is conceded by the Supreme Court of Indiana to have been perfect so far as rights under the judgment in favor of the partnership and against Gates in the Circuit Court of Cook County, Illinois, are concerned. The court in its opinion says: (Rec. p. 330.)

"It is true that after the death of a member of a partnership the surviving partner, or partners, are vested with the exclusive right to possession and management of the partnership property, including the exclusive right to collect the debts due the partnership, by suit or otherwise. Parsons on Partnership, secs. 342–344–345; *McIntosh* v. *Zaring*, 150 Ind. 301–312 and cases cited; *Valentine* v. *Wysor*, 123 Ind. 47–52. * * *

In other words, while rights of action for liabilities due a partnership survive and vest exclusively in the surviving members of the firm, the liabilities of the partnership, on the death of a partner, survive not only against the surviving partners, but also against the estate of the deceased partner."

XIX.

By the cross-complaint itself, and upon its very face, it appears that the cause of action set up therein was adjudicated in the Illinois judgment. (Trans. 9–12.)

A demurrer to this counter-claim was overruled, with exception, and a reply was filed.

This paragraph of the counter-claim distinctly charges plaintiffs with fraudulent misconduct and breach of contract. Thus it is said (Trans. 10):

"That but for the improper and fraudulent conduct of the said Newman, Northrup & Levinson in advising and giving legal advice to the said Harry B. Gates, trustee, as hereinafter stated, there would have been assets, etc."

And again (Trans. 12) it is said:

"Wherefore, this defendant says that by the negligence and fraudulent conduct of the said Newman, Northrup & Levinson, as aforesaid, he was damaged in the sum of $2,500, for which amount he prays judgment, etc."

When the case first went to the Appellate Court of Indiana that court seemed to treat this paragraph of the counter-claim as alleging fraudulent misconduct on the part of the plaintiffs.

Gates v. *Newman*, 18 Ind. App. 392.

The highest standards of good faith, *uberrima fides* of the civilians, is applied in testing the conduct of lawyers towards their clients. If the plaintiffs were guilty of fraudulent conduct in the discharge of any of their obligations to the defendant as alleged in this paragraph of the counter-claim, nothing is better settled than that in an action to recover for services such conduct would entirely defeat their recovery. This has been frequently held in suits brought by agents to recover compensation. This court has announced that doctrine (*Wadsworth* v. *Adams*, 138 U. S. 380) and it has been frequently declared by the United States Circuit Courts of Appeals and other federal tribunals:

Hofflin v. *Moss*, 67 Fed. Rep. 440;

McKinley v. *Williams*, 74 Fed. Rep. 94;

St. Louis, etc., Co. v. *Edison Gen. El. Co.*, 64 Fed. Rep. 997.

In *Prescott* v. *White*, 18 Ill. App. 322, Mr. Justice McAllister laid down what is understood to be the rule in Illinois in clear and perspicuous language. He there said:

"The person who bargains to render services for another is deemed in law to undertake for good faith and integrity in the performance of his duties and is liable in damages to his employer for negligence, bad faith or dishonesty. Not only that, but the law goes further. For gross misconduct in the course of

his agency or intentional frauds upon his principal, he may be held to have forfeited all right to compensation as respects any of the business of the principal into which such fraud or misconduct shall have entered."

While it is undoubtedly true that every breach of contract does not disable the party to whom it is imputed from maintaining an action upon it, the law considering the right of the other contracting party to such damages as he may have sustained by such breach as meeting the justice of the case, yet, where bad faith and fraud have intervened, the rule seems to be well settled in accordance with the authorities just referred to. It would seem to follow as a logical conclusion from this principle that where an action is brought by an agent or a lawyer against his principal or client for the value of services rendered, and he therein recovers judgment, such judgment must, at least, adjudicate his right to recover, and prevent the defendant, in any subsequent suit, from asserting such fraudulent misconduct as, if averred and proved in the suit in which the judgment was obtained, would have conclusively established that the plaintiff had no such right.

That such a defense is admissible under the general issue filed to the common counts in assumpsit at common law and in Illinois is so elementary as to require neither discussion nor the citation of authority.

It is not, of course, necessary for the plaintiffs to rely upon this view; for it is perfectly apparent from the record in this case, and such was the view of the Appellate Court when the record of the trial on which this judgment was obtained was before it, that all of the matters set up and relied upon in this paragraph of the defendant's counter-claim, and proved in this

case, were fully litigated in the Circuit Court of Cook County, Illinois, in the case in which the Illinois judgment was rendered (See, particularly, testimony of Mr. Judd, Trans. 263–264).

It was, therefore, the duty of the court of trial to have recognized the validity of the Illinois judgment, and, after the evidence was all in, to have directed a verdict accordingly.

When the defendant offered evidence in support of this counter-claim plaintiffs objected upon the constitutional grounds. (Rec. p. 75.)

We have elsewhere set forth the manner in which the constitutional question was set up and relied upon in the trial court and in the Supreme Court.

Upon the above state of the record we assert that, as this court did in *Jaster* v. *Curry*, supra, *Finney* v. *Guy*, supra, *Andrews* v. *Andrews*, supra, *Jacobs* v. *Marks*, supra, it may upon this record say that Gates's counter-claim stated a cause of action which was extinguished by the Illinois judgment; that "full faith and credit" required that the Illinois judgment be held to bar Gates's alleged counter-claim; that being so, the personal representative of Northrup was not a necessary party to an appeal, because the plaintiff's cause of action as held by the Supreme Court of Indiana passed to the surviving partners who are all on the record, and the presence of Northrup's personal representative is required solely upon Gates's counter-claim.

Conclusion.

We do not believe that any unprejudiced lawyer can read this record and not be impressed by the fact that the courts of Indiana have worked out a wrong result in this action based

upon the Illinois judgment. We shall not here attempt to account for the action of the Indiana courts; we simply state it as our opinion.

We have applied to this court for redress in good faith, believing that the protection of the Constitution has been properly set up and claimed. While at the first blush the question decided below was apparently one of local law, we have been impressed so strongly with the opinion that, like *Jaster* v. *Curry*, *Jacobs* v. *Marks*, *Andrews* v. *Andrews*, and other cases cited, the local question was rooted and grounded in a federal right and inseparably connected herewith that we have felt justified in claiming the protection of the strong arm of this Honorable Court.

We are neither so ignorant as to be unconscious of the difficulties of the case, nor so unworthy as to attempt in a bad cause to knowingly muddy the waters in hope that we might thus find refuge under the rock of this court's protection, whereas in the clear waters of reason we should be surely netted. The cause is submitted in the confident faith that this tribunal, unswayed by prejudice of race or locality, has the will to work out justice and the wisdom to find the way.

Respectfully submitted,

CHARLES MARTINDALE,

Attorney for plaintiffs in error.

S. S. GREGORY,

Of counsel.